SYARIKAT KERJASAMA NESA PELBAGAI BERHAD

v.

V. SOTHIRASAN & 4 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
TUAN RICHARD TALALLA J
[CIVIL SUIT NO: D2-22-354-1989]
27 SEPTEMBER 1994

PRACTICE & PROCEDURE*: Costs - Application for summary judgment dismissed with costs - Defendants filing bill of costs and seeking taxation of the same - Plaintiff objecting - Whether costs should be taxed at the end of the action when final judgment is delivered - Whether costs payable forthwith - SAR taxing bill of costs - Appeal to Judge - Consideration of O. 14 r. 7 Rules of the High Court 1980.*

The plaintiff applied under O. 14 of the Rules of the High Court 1980 for summary judgment against the third and fourth defendants (the defendants). The application was dismissed with costs by the SAR and the plaintiff appealed. The learned Judge dismissed the appeal with costs. The defendants jointly filed a bill of costs and sought taxation of the same. The SAR taxed the costs and the plaintiff appealed against the decision on the grounds that the costs should be taxed at the end of the action when final judgment is delivered.

The question that arose for decision was whether the defendants were entitled to immediate taxation of the bill of costs even though the said order dismissing the appeal did not specify that costs were to be paid "forthwith".

Held:

[1] By any rule of construction, be it the literal rule, the mischief rule or any other rule, it is implicit from the plain words of the relevant provisions in r. 7(1) of O. 14 of the Rules of the High Court 1980, that costs awarded interlocutorily are generally to be taxed and paid at the end of the action when costs are usually awarded finally and it is only when such interlocutory costs are expressly ordered to be paid forthwith that they may be taxed immediately and thereafter payment sought. That is the procedural law in this country as confirmed as far back as 1959 in *Chow Yong Hong's* case and reiterated thirty years later in the *Ko Ko Ma* case.

[2] The commentaries at paras 14/7/4 & 62/4/1 of the Supreme Court Practice 1967, which say otherwise, stand on their own and are not supported by authority. They fly in the face of the clear words of the Rules namely r. 7 of O. 14 and r. 4 of O. 62 and are wont to render the words requiring costs to be paid forthwith surplusage and that cannot be so. As against the clear and literal terms of the Rules, the commentaries must be rejected.

[3] In as much as the case of *Adam & Harvey Limited v. International Maritime Supplies Company Limited* stands on those commentaries, the decision in that case although ordinarily highly persuasive being that of the English Court of Appeal, cannot be followed. It follows that the *Allied Collection Agencies* and *East Asiatic Co.* cases which relied on the *Adam & Harvey* case and the commentaries also cannot be followed.

[4] As the plaintiff had applied for summary judgment so the third defendant had applied for an order that the plaintiff's action against him be struck out. The SAR allowed the third defendant's application and the plaintiff's appeal against that decision was dismissed on the same day as the plaintiff's appeal on the summary judgment application. The bill of costs

was filed in reliance of the orders made on both the appeals and in the circumstances of the case there should not have been a joint bill of costs.

[Plaintiff's appeal allowed with costs to be taxed. Decision of SAR to overrule plaintiff's preliminary objection, the taxation of the bill of costs and bill of costs itself set aside. Third defendant given liberty to file third defendant's bill of costs forthwith].

Cases referred to:

Chow Yong Hong v. Chow See Lim & Anor. [1959] MLJ 23 ***(foll)***

Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd. [1990] 1 MLJ 304 ***(foll)***

The East Asiatic Co. (M) Berhad v. Kilang Papan Aman Sdn. Berhad, (KLH Sivil Suit No. 2157 of 1985 (unreported) ***(not foll)***

Adam & Harvey Limited v. International Maritime Supplies Company Limited [1967] 1 AER 533 ***(not foll)***

Allied Collection Agencies Limited v. Wood v. Anor. [1981] 3 AER 176 ***(not foll)***

JT Stratford & Son Ltd v. Lindley (No.2) [1969] 3 All ER 1122 at 1123, [1969] 1 WLR 1547 at 1553 ***(not foll)***

Settlement Corpn v. Hochschild [1967] 111 Sol Jo 354 ***(refd)***

Graham v. Sutton, Carden & Co. [1897] 2 Ch. 367 ***(refd)***

M. Pocock v. ADAC [1952] 1 TLR 29 at p. 34 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964
Rules of the High Court 1980, O. 14 r. 7, O. 59 rr. 1, 4(1), O. 81 r. 6
Rules of the Supreme Court 1957, O. 14 r. 9, O. 20 r. 11, O. 62, r. 11(1) & O. 86 r. 7
Supreme Court Costs Rules 1959, O. 62 r. 4(1) (UK)

Other sources referred to:

Supreme Court Practice [1985] para. 14/7/4, 62/4/1

For the plaintiff - M/s. T.H. Su & Co.
For the defendants - M/s. P.S. Ranjan & Co., M/s. K. Mano & Associates, M/s. Moghan & Co.

JUDGMENT

Richard Talalla J:

In this action the plaintiff made application under O. 14 of the Rules of the High Court 1980 (the Rules) for summary judgment against the third and fourth defendants (the defendants). The application was returned before the learned Senior Assistant Registrar (the SAR) and she dismissed it with costs. The plaintiff then appealed to the Judge in chambers who likewise dismissed the appeal with costs. The defendants thereupon jointly filed a bill of costs and sought taxation of the same. At the taxation Counsel for the plaintiff raised a preliminary objection saying that the costs should be taxed at the end of the action when final judgment is delivered. Counsel for the defendants argued otherwise. The SAR overruled the preliminary objection and proceeded to tax the costs. The plaintiff appealed to this Court against the decision of the SAR and argued that the SAR should have upheld the preliminary objection and declined to tax the costs.

The authority for making the order for costs is O. 14 r. 7 of the Rules. Rule 7 is clear in its terms. An analysis of those terms shows that in certain circumstances the Court may dismiss the application (implicitly an application under O. 14) with costs. The Rule then goes on to provide that the Court may require the costs to be paid forthwith by which there should be no difficulty in deducing that if there is no requirement that the costs be paid forthwith, the costs will not be payable forthwith but at a later stage. These being interlocutory costs, it

was argued on behalf of the plaintiff by Counsel in *Chow Yong Hong v. Chow See Lim & Anor.* [1959] MLJ 23 at p. 24 that such costs are normally subject only to one taxation at the end of the suit and at the same page Smith J who was dealing with O. 14 r. 9 of the Rules of the Supreme Court 1957 which rule is in *pari materia* with r. 7 abovestated said:

> Reading O. 14 r. 9 as a whole it is clear that the Judge under para. (a) has power to say when the costs shall be paid, and under para. (b) he is given the express power to order payment forthwith. In this particular case it is not expressly ordered that costs be paid forthwith. It could therefore be implied that, since it is not ordered that costs be paid forthwith, the usual practice should prevail and that the costs should become payable when the suit has been finally decided.

Chow Yong Hong's case was followed by Dzaiddin J, as he then was, in *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd.* [1990] 1 MLJ 304. However in Kuala Lumpur High Court Civil Suit No. 2157 of 1985 *The East Asiatic Co. (M) Berhad. v. Kilang Papan Aman Sdn. Berhad.*, it was ruled *inter alia* as follows:

> I am concerned here with the proper interpretation to be put upon an order dismissing an interlocutory application with costs. The issue is whether the effect of such an order is that the successful party should have his costs to be taxed and paid forthwith, or whether such costs are really costs in any event only to be settled at the conclusion of the trial.
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> I must confess that at first sight I was under the impression that being an interlocutory application the defendants were only entitled to have their costs paid at the end of the trial and that the proper interpretation of the Registrar's order was that the costs should be the defendants' costs in any event.
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> I have since had an opportunity of considering the cases of *Adam & Harvey Limited v. International Maritime Supplies Company Limited* [1967] 1 AER 533, and the case of *Allied Collection Agencies Limited v. Wood & Anor.*[1981] 3 AER 176. I have also looked at the commentary in the *Supreme Court Practice* [1985] para. 62/4/1. The English O. 62 r. 4 is similar to the Malaysian O. 59 r. 4(1) of the Rules of the High Court 1980.
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> Upon consideration of these authorities, I am left in no doubt now that the only interpretation of the Registrar's order, "dismissed with costs" is that the costs were to be taxed and paid forthwith.

It will be observed that the learned Judge's first impression was that the interlocutory application having been dismissed with costs, those costs were payable only at the end of the trial, but, persuaded by the said authorities, three in number, the Judge eventually decided otherwise.

As my impression coincides with the initial thinking of the learned Judge, it becomes necessary to examine the said authorities namely the two cases and the commentary that were relied on. Before doing so I should state that the English O. 14 r. 7, 62 r. 11, 64 r. 4 and 86 r. 7 were at all times material to this examination *mutatis mutandis* similar to our O. 14 r. 7, 59 r. 1, 59 r. 4 and 81 r. 6 respectively.

The first case, *Adam & Harvey*, concerned an application for summary judgment in respect of which Master Ritchie had given leave to defend the action conditional upon the sum claimed being paid into Court. The defendant's appeal to the Judge, Browne J, was dismissed. The defendant's further appeal to the Court of Appeal was allowed and it was ordered that the orders of Brown J and Master Ritchie be set aside and that in lieu thereof the defendants be given unconditional leave to defend the action. During the discussion as to costs, it was submitted for the defendants that the usual order in the circumstances was that the costs before the Master should be costs in the cause and that the defendants should have the

costs before the Judge and in the Court of Appeal and Harman LJ said: "That is right, but not an immediate taxation." The order as to costs which was drawn up was that (1) the costs before the Master should be costs in the cause; (2) the costs before Browne J should be the defendants' costs in any event. On 22 November 1966, the defendants' solicitors wrote to the plaintiffs' solicitors stating that they were instructed to enforce payment of the costs awarded to their client by the Court of Appeal immediately on receipt of the taxing master's certificate. The plaintiffs applied by motion for an order, *inter alia*, under RSC O. 20, r. 11, that so much of the order as provided that the plaintiffs should pay to the defendants or their solicitors the costs of the appeal, such costs to be taxed by a taxing master, should be corrected so as to provide that the costs of the appeal be the defendants in any event. At the hearing on the motion Harman LJ, with whom Diplock LJ and Winn LJ agreed, at pp. 447 and 448 said:

> This motion raises a point upon which there appears to be a certain amount of doubt in professional circles.
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> As far as I am concerned, I am quite clear what I intended to do. I said in the course of the interlocutory observations: "No immediate taxation." This was in reply to Mr. Eastham. But, as he rightly points out, that does imply that if an order is made in this Court for payment of costs, it does mean that the successful party has a right to an immediate taxation and payment. I have been under the impression that the Court, when it meant to have that result, would say expressly: "Costs to be taxed and paid forthwith". But the *Supreme Court Practice, 1967*, shows that I was wrong about that. It is a thing often asked for (I have asked for it myself) and I have made the order in that form, notwithstanding that the application was interlocutory, that payment should be made at once if the successful party chose to tax the costs. However that may be, I think it is fair to Mr. Eastham to say that in spite of the fact that he assented to my interlocutory observation, there was this difference (although I did not intend that it should be made) that he applied in a form of words which would carry, if it was assented to, an immediate taxation. That seems to have passed the Court by: as far as I am concerned, perhaps by my inadvertence. I do not know: I cannot remember now. It did not strike Counsel for the plaintiffs, who was unaware of the difference that there is between "appeal allowed with costs in any event" and "appeal allowed with costs", which is something of a nicety. As Mr. Eastham endorsed his brief and as the associate understood, it was an order which entailed the right to an immediate taxation and payment. That was in March.
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> It was next heard of in November. At that point the successful party took out a summons to tax the costs immediately and have them paid. The plaintiffs then woke up to the danger in which they were: hence this motion. It may be not unconnected with the fact that there had been an application for security which had not succeeded. As far as I am concerned, as I say, I did not intend - I do remember that much about it - that there should be this exceptional order for payment of costs at once, but that costs should be in any event those of the successful appellant. That was the order I intended to pronounce and I thought I had done so. But I see there is some room for mistake owing to the fact that after I had made the observation which showed I did not intend an immediate taxation, an application was made which could have had that result and was so interpreted by the associate. I think that is a slip and I think it is a slip which can be amended under RSC., O. 20, r. 11, because inadvertently the order as drawn did not express the intention of the Court owing to a misunderstanding between the associate and the Court which pronounced it. I am not blaming anybody for it, except perhaps myself for not being more vigilant in the matter. I am sure of what I intended and I think we have jurisdiction to give effect to that intention, and I would so hold.

Here again, as in *The East Asiatic Co.* case the learned Judge was initially of the impression that when the Court meant the successful party to have a right to an immediate taxation and payment, which is the exception, it would say expressly that the costs be taxed and paid forthwith, and consequently, by necessary implication, if there was no order for payment

forthwith then those costs, as is the case generally, would be taxed and paid at the end of the trial and once again the learned Judge decided otherwise, on this occasion being persuaded by *The Supreme Court Practice 1967*. An examination of this authority discloses the following two commentaries:

[para. 14/7/4]

> An order dismissing the summons with costs, without expressly stating that they should be paid "forthwith" enables the defendant to tax his costs forthwith without waiting for the proceedings to be concluded; but it is in the discretion of the Master when dismissing the summons, to order the costs to be the defendant's in any event, thus making the costs payable only on the conclusion of the proceedings. In practice, this is the more usual form of order with regard to costs when dismissing the summon under O. 14.

[para. 62/4/1]

> Where one party to a summons is awarded costs to be paid he is entitled to have them taxed and paid at once, and this although the order does not refer to taxation.

The commentary last referred to is in *pari materia* with the like numbered paragraph in the 1985 edition of the same book referred to in *The East Asiatic Co.* case.

The said commentaries stand on their own. They are not supported by authority. They fly in the face of the clear words of the Rules namely r. 7 of O. 14 and r. 4 of O. 62 and are wont to render the words requiring costs to be paid forthwith surplusage. That cannot be so. As against the clear and literal terms of the Rules last referred to the commentaries, with respect, must be rejected. Inasmuch as the *Adam & Harvey* case stands on those commentaries, again with respect, the decision in that case although ordinarily highly persuasive being that of the English Court of Appeal, cannot be followed.

The second case calling for examination is the *Allied Collection Agencies* case aforesaid. In that case the plaintiff had successfully made an *ex parte* application for an injunction. A summons was then issued so that the matter could be returned before the Court *inter partes*. It was agreed between Counsel appearing on the summons that the application should be dismissed and the Judge accordingly did so. The order as initialled by the Judge was, "Application dismissed. Defendants' costs in any event. ...". A formal order was drawn up by the plaintiff's solicitors to that effect. The defendants then applied pursuant to O. 20 r. 11 of the Rules of the Supreme Court, which is similar to the like numbered Rule of our Rules, commonly called the Slip Rule, to correct a clerical error in the said order. The defendant's application was finally heard by Neill J to whom it was clear on the facts that he had to proceed on the basis that neither the Judge nor Counsel used the words `in any event' and that these words were added by the clerk to the Court when the order was written out to be initialled by the Judge. In those circumstances Neill J said it would be open to him merely to delete the words `in any event' as being a clerical error and to leave the question as to the meaning of the order without these words to be debated before the taxing master and perhaps in further proceedings. The Judge however was prevailed upon not to take that course but to deal himself with the effect of the order with the words `in any event' omitted. This is what Neill J said in his judgment:

> I have been urged not to take that course but to deal in my judgement with the effect of the order with the words `in any event' omitted; in other words, I am asked to express a view on the effect of an order made on an interlocutory application, `defendants' costs'.
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> Counsel for the defendants submitted that there was a well-recognised distinction between 'defendants' costs' and 'defendants' costs in any event'. Under the first form of order the

defendants are entitled to proceed to tax their costs immediately; under the second form of order taxation is postponed until the conclusion of the proceedings.

Counsel drew my attention to two authorities. In *Adam & Harvey ltd. v. International Maritime supplies Co. Ltd.* [1967] 1 ALL ER 533, [1967] 1 WLR 445 an application was made to the Court of Appeal by motion under RSC O. 20, r. 11 to correct an order in the terms 'Appeal allowed with costs' so as to add the words 'in any event'. The application succeeded.

In his judgment Harman LJ referred to the fact that in the course of the interlocutory observations he had used the words 'No immediate taxation' and all the members of the Court were of the view that the order a drawn did not express the intention of the Court. Harman LJ said ([1967] 1 ALL ER 533 at 534, [1967] 1 WLR 445 at 448):

> ... I did not intend that there should be this exceptional order for payment of costs at once, but that costs should be in any event those of the successful appellant.

The second case to which Counsel referred was *JT Stratford & Son Ltd v. Lindley (No 2)* [1969] 3 ALL ER 1122 at 1123, [1969] 1 WLR 1547 at 1553. In the course of his judgment, Lord Denning MR referred to the meaning of the phrase 'costs in the cause' and continued:

> "Plaintiff's costs in any event" means that, no matter who wins or loses when the case is decided, the plaintiff is to have the costs of those interlocutory proceedings. "Plaintiff's costs" means that the plaintiff is to have the costs of the interlocutory proceedings without waiting for a decision.

Counsel also drew my attention to Bullen and Leake's *Precedents of Pleadings* (9th Edn., 1935, p. 53, note 6) which included these words:

> If the Master orders the costs to be "Defendant's costs in any event," the plaintiff will have to pay the costs of the application on both sides, whatever the result of the action, but not at once: they will be taken into account in the ultimate taxation. It is only where the application is dismissed 'with costs' that the successful party is entitled to an immediate taxation.

Accordingly, Counsel submitted that as, the parties had omitted the words 'in any event' the effect of their agreement was that the defendants were entitled to an order which would give them the right to an immediate taxation. The words 'defendants' costs' would give them that right.

Counsel for the plaintiff company did not seek to contend that the words 'in any event' should be allowed to remain merely because that was the usual form or order, or because he himself had in contemplation that the normal form of order as to costs would follow. He recognised that the words 'defendants' costs' or words to the same effect had been employed on both sides. He was therefore constrained to put forward the following arguments, which he advanced with force and clarity: (1) that since the coming into force of r. 4(1) of the Supreme Court Costs Rules 1959, which is now RSC O. 62, r. 4(1), an order which requires costs to be paid forthwith must say so in terms. The all important word, said Counsel is 'forthwith'; if that word is omitted the order does not give the relevant party the right to an immediate taxation; (2) that the decision in *Adam & Harvey Ltd. v. International Maritime Supplies Co. Ltd.* was reached *per incuriam* and without regard to the wording of O. 62, r. 4(1), or the corresponding words in the 1959 rules; (3) that I was entitled not to follow the guidance of Lord Denning MR in *JT Stratford & Son Ltd. v. Lindley (No.2)* because what the Master of the Rolls had said on the matter was plainly *obiter*.

I shall deal first with Counsel's argument based on O. 62, r. 4(1). That rule is in these terms:

> Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the Court for the payment of any

> costs may, if the Court thinks fit, and the person against whom the order is made is not an assisted person, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

Counsel submitted that this rule plainly contemplates a form of words in the order which make it clear to the paying party that the payment is to be made forthwith.

In this context, I was also referred to O. 86, r. 7 (which deals with dismissal of an application for summary judgment in an action for specific performance) and to O. 14, r. 7(1). It is sufficient if I read the terms of O. 14, r. 7(1). This provides:

> If the plaintiff makes an application under r. 1 where the case is not within this Order or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then without prejudice to O. 62, and, in particular, to r. 4(1) thereof, the Court may dismiss the application with costs and may, if the plaintiff is not an assisted person, require the costs to be paid by him forthwith.

In each of these rules, i.e. O. 14, r. 7, O. 62, r. 4 O. 86, r. 7, the word 'forthwith' is used. Moreover, it would appear that by O. 14, r. 7 and O. 86, r. 7 two separate discretions are conferred: a discretion to dismiss the application with costs and a further discretion, where the plaintiff is not an assisted person, to require the costs to be paid by the plaintiff forthwith.

I should now refer to O. 62, r. 11 (formerly r. 11 of the 1959 Rules). That rule provides as follows:

> (1) Where an action, petition or summons is dismissed with costs, or a motion is refused with costs, or an order of the Court directs the payment of any costs, or any party is entitled under r. 10 to tax his costs, no order directing the taxation of those costs need be made...

In the light of that rule, it can be argued that if a summons is dismissed with costs under O. 14, r. 7 or O. 86 r. 7 the defendant can proceed to taxation without any further order. Why then is it necessary to include in these two rules the words 'as to payment forthwith', unless it is intended that a mere dismissal with costs would not be sufficient to secure immediate taxation and payment, notwithstanding the wording of O. 62, r. 11(1).

I see the force of this argument, but I am satisfied that in the course of time the words 'defendant's costs' have acquired a special meaning. The words constitute, as Counsel for the plaintiff company put it, a formula. The formula is used where the Court or, as in this case, the parties intend or must be deemed to intend that the defendant should be entitled to tax his costs immediately. Moreover, I see no escape from the plain words of O. 62, r. 11(1) that where a summons is dismissed with costs no order directing the taxation of those costs need be made. The opening words of this rule are the same as those in RSC 1883, O. 65, r. 27(33) which was the corresponding rule before the Supreme Court Costs Rule 1959 came into force. Regulation (33) was itself based on the old practice laid down in Consolidated O. 40, r. 38.

I can deal with Counsel's other arguments for the plaintiff company more briefly. I am afraid I am quite unable to accept the argument that I can regard the decision in the *Adam & Harvey Ltd.* case as decided *per incuriam*; nor would I wish to disregard the guidance of Lord Denning MR in *JT Stratford & Son Ltd. v. Lindley* (No 2). It is further to be observed that a few weeks after the judgments in the *Adam & Harvey Ltd* case were delivered an application was made following an interlocutory appeal in *Settlement Corpn. v. Hochschild* [1967] 111 Sol Jo 354, where the report says:

> ... some doubt arose as to whether the appeal had been dismissed "with costs" or "with cost in any event", the briefs of leading and junior Counsel having been differently endorsed in that respect.

In the course of the application to ascertain the intention of the Court, reference was made to the *Adam & Harvey Ltd.* case which dealt with the respective effects of the orders. Lord Denning MR said the appeal had been dismissed 'with costs in any event'. He desired to say that that was the usual order in interlocutory appeals, save in exceptional circumstances.

I can therefore state my conclusion as follows. (1) Where on an interlocutory application the Court intends that one party is to have the costs, the usual form of order is 'costs in any event'. It is only in exceptional circumstances that the words 'defendant's costs' or the words 'plaintiff's costs' are used. (2) If the words 'plaintiff's costs' or 'defendant's costs' are used they are effective to entitle the party concerned to obtain an immediate taxation.

I would only add this. I have been forced to conclude on the material which has been put before me that the words 'defendant's costs', have the meaning for which Counsel for the defendants contends. One cannot, however, regard the present situation as satisfactory. There is an apparent inconsistency between RSC O. 62, r. 11(1), on the one hand, and O. 62, r. 4(1), O. 14, r.7(1) and O. 86, r. 7, on the other hand. I would hope that the matter can be brought to the attention of the Rule Committee so that the present formula can be replaced and a form of order can be prescribed to cover the exceptional case where immediate taxation is intended. I regard the present formula as a source of confusion.

It would appear that the matter was indeed brought to the attention of the Rule Committee resulting in the introduction of the English O. 62 r. 8 which states the new principle that costs are not to be taxed until the conclusion of the proceedings irrespective of the stage in the proceedings at which the order is made unless the Court expressly orders an earlier taxation and in such cases it will order "Taxation forthwith". Thus the decision in the *Allied Collection Agencies* case has in effect been reversed. See The *Supreme Court Practice 1993*, Vol. 1 para. 62/8/1. Consequently the English O. 14 r. 7 and 86 r. 6 (which has replaced r. 7) now as therein respectively stated apply without prejudice to the new English O. 68 r. 8 para. (1) to (3) although para. (3) which refers to an assisted person *vis a vis* legal aid does not apply in any case to this country. Order 62 rr. 4 and 11 referred to by Neill J appear to have been deleted from the English Rules of the Supreme Court. Thus the so called unsatisfactory and confusing situation in England has been remedied by amendment to the Rules last referred to. Those Rules however do not apply to our Court. Accordingly the decision of Neill J has to be examined further for its persuasiveness.

In the first place, contrary to Neill J who, with respect, might have been diffident about coming into open collision with the views of Harman LJ and the other Lord Justices in the *Adam & Harvey* case and the Master of the Rolls in the *Stratford* case, I am minded to agree with the arguments of Counsel for the defendant as abovestated which as Neill J himself conceded were advanced with force and clarity. The arguments are self explanatory.

In the second place the learned Judge could see the force of the argument that if a summons was dismissed with costs under O. 14 r. 7 or O. 86 r. 7 and the defendant could proceed to taxation without any further order, that would result in a question as to why then it was necessary to include in these two rules the words 'as to payment forthwith'. But the learned Judge seemed to consider himself thwarted by the wording of O. 62 r. 11(1) from the plain words of which, to use his own phrase, he could see no escape. The learned Judge held the view that the terms of O. 62 r. 11(1) on the one part appeared to be inconsistent with the terms of O. 62 r. 4(1), O. 14 r. 7 and O. 86 r. 7 on the other part. After anxious consideration I regret that I cannot find any contradiction or disharmony between the two. To use the same words of the learned Judge I too see no escape from the plain words of O. 62 r. 11(1) that where a summons is dismissed with costs, no order directing the taxation of those costs need be made. But I see with different eyes and take in the fact that nowhere in O. 62 r.

11(1) is it stated when taxation, which is implicit, of those costs is to take place nor, more importantly, when those costs upon taxation are to be paid. Inasmuch as r. 11(1) does not state when the costs are to be taxed or paid, I do not see any inconsistency as envisaged by the learned Judge.

In the third place the learned Judge was satisfied that in the course of time the words 'defendant's costs' had acquired a special meaning, that the words constituted a formula which was used where the Court or, as in that case, the parties intended or had been deemed to intend that the defendant should be entitled to tax his costs immediately. I know that I can safely say after 38 years of forensic experience that those words have not acquired any special meaning in our Court. In fact those words are hardly used in our Court let alone their having a special meaning. Even Neill J in his conclusion said that it is only in exceptional circumstances that the words 'defendant's costs' or the words 'plaintiff's costs' are used.

In the fourth place the learned Judge felt himself quite unable to accept the invitation to regard the decision in the *Adam & Harvey* case as decided *per incuriam*. I have already commented on that case. With resect I think it was decided *per incuriam.*

In the fifth and last place the conclusion arrived at by Neill J is not supported by the plain words of the various rules abovestated.

The view I take is that by any rule of construction, be it the literal rule, the mischief rule or any other rule, it is implicit from the plain words of the relevant provisions in the Rules of the High Court 1980 as hereinbefore reviewed and for the purposes of the matter under consideration, r. 7(1) of O. 14 of the said Rules, that costs awarded interlocutorily are generally to be taxed and paid at the end of the action when costs are usually awarded finally and it is only when such interlocutory costs are expressly ordered to be paid forthwith that they may be taxed immediately and thereafter payment sought. I believe that to be the procedural law in this country as confirmed as far back as 1959 by Smith J in *Chow Yong Hong's* case and reiterated thirty years later by Dzaiddin J in the *Ko Ko Ma* case. For the reasons hereinbefore stated I do with respect decline to follow the *Adam & Harvey* and the *Allied Collection Agencies* cases and the commentaries referred to in *The Supreme Court Practice* 1967 and 1985 set out above. It has to follow that I cannot accept the decision in the *East Asiatic Co* case.

The rule against multiplicity is not only in respect of actions but also proceedings, as expressly stated in para. 11 of the schedule to the Courts of Judicature Act 1964. Those proceedings in my view include interlocutory proceedings which in turn embrace taxation of costs. It is fairly common in the course of an action for several interlocutory applications to be made resulting in the costs thereof being awarded to one or other of the parties. It would be horrendous if every time such costs are awarded they are allowed to be taxed forthwith. Our Registries would be inundated with bills of costs for taxation followed to boot by the filing of writs of execution in several instances. It may be that the Rule Committee had in mind this mischief and successfully drafted the relevant Rules, as they now stand, to provide against the same.

A second mischief can arise in a situation where one party collects taxed costs at one or more of the interlocutory stages only to fail at the end of the proceedings with overall costs being awarded against that party. That party may be destitute resulting in inability to pay the overall costs, thus leaving the successful party with nothing more than a pyrrhic victory and the unsuccessful party with a pocketful of money be way of interlocutory costs which hardly accords with justice being done but on the contrary invites public contempt of the judicial system.

Graham v. Sutton, Carden & Co. [1897] 2 Ch. 367 is authority for the proposition that where a plaintiff has been guilty of oppresive conduct in a suit or has used the process of the Court vexatiously, the Court has a right to stay proceedings till the costs which the plaintiff has been ordered to pay are paid. In *Chow Yong Hong's* case, Counsel cited *Graham's* case as authority for ordering interlocutory costs to be paid forthwith when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct and this was accepted in the *Ko Ko Ma* case. That submission of Counsel is not wholly correct for nowhere in *Graham's* case was reference made to unreasonable conduct and it is significant that Smith J in *Chow Yong Hong's* case made no reference to the *Graham* case when at p. 25 he expressed the view that the only condition justifying an order for payment of costs forthwith is where the plaintiff in the opinion of the Judge knew that the defendants relied on a contention which would entitle them to unconditional leave to defend. To my mind such a condition may not necessarily justify the making of such an order, but rather when the circumstances amount to an abuse of the Court's process should that order be made. That proposition in my view accords with *Graham's* case. It also has the implicit support of Lord Goddard CJ when he said in *M. Pocock v. ADAC* [1952] 1 TLR 29 at p. 34 "I wish it to be known as a practice rule that the proper course for a Master to take, if he considers that in a summons under O. 14 it is clear that the plaintiff knew that there was an arguable defence to the claim, is to dismiss the summons with costs. Masters should use their powers under O. 14 much more freely." I do recognise that there is no reference in that case to payment of costs forthwith. I take the view however that such payment should follow as a natural consequence of such strong advice, provided the circumstances amount to an abuse of the Court's process.

Apart from the sort of conduct referred to in *Graham's* case, as I see it, a party who acts in bad faith will in appropriate instances at the interlocutory stage be mulcted in costs to be paid forthwith; not necessarily so if the conduct is merely unreasonable.

I have to revert again to the *Ko Ko Ma* case, in particular to p. 305 and say that although in a situation such as in the *Graham* case costs may be awarded in any event, those costs, if the practice in the English Courts is followed, will be taxed and paid at the end of the action, see *The Supreme Court Practice* 1993 Vol. 1 para. 14/7/4. The result is the same if our own Rules are observed, as indeed they must.

As the plaintiff had applied for summary judgment so the third defendant had applied for an order that the plaintiff's action against him be struck out. The SAR allowed the third defendant's application. Against that decision the plaintiff appealed to the Judge who dismissed the appeal. On the same day the plaintiff's appeal first referred to above was dismissed. The bill of costs was filed in reliance of the orders made on the 2 appeals and the SAR's orders thereunder. For the reasons aforesaid there should not have been a joint bill of costs.

Accordingly I find for the plaintiff in this appeal which is allowed. The decision of the SAR to overrule the plaintiff's preliminary objection is set aside as is the taxation of the bill of costs and the bill of costs itself. It is further ordered that there be liberty to the third defendant to file forthwith the third defendant's bill of costs. The plaintiff is to have the costs of the appeal and the costs below of the preliminary objection, such costs to be taxed.